Supreme Court, U. S.
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NO. 80-972

IN THE UNITED STATES SUPREME COURT

October Term, 1980

* * * * *

James Daniel Oldag, Petitioner

v.

Catholic Charities of the Diocese of Galveston-Houston and Cynthia Ann Tuttle

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * * * *

SIDNEY LEVINE
110 Main Street
Sealy, Texas 77418
713/865-2989

JOHN V. ELICK
Attorney for Petitioner
Post Office Box 803
Two East Main
Bellville, Texas 77418
713/865-3647
Texas Bar #06521000

QUESTION PRESENTED FOR REVIEW

WHETHER THE "BEST INTEREST RULE" USED IN SECTION 13.21 OF THE TEXAS FAMILY CODE CAN BE CONSTITUTIONALLY APPLIED TO THE CLASS OF UNWED FATHERS WHEN ESTABLISHING THEIR STATUS AS "PARENTS" WHEN ALL MOTHERS AND MARRIED FATHERS ARE GIVEN STATUS AS A "PARENT" WITHOUT ANY APPLICATION OF THE "BEST INTEREST RULE", BECAUSE SUCH DISCRIMINATORY TREATMENT OF UNWED FATHERS VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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NO. _____

IN THE UNITED STATES SUPREME COURT

October Term, 1980

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IN THE INTEREST OF T. E. T.

* * * * *

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

* * * * *

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, **JAMES DANIEL OLDAG,** prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, entered in this case on July

16, 1980. Petitioner's Motion for Rehearing of Application for Writ of Error was denied September 12, 1980.

OPINION BELOW

The opinion of the Supreme Court of Texas below is reported as In the Interest of T.E.T. 603 SW2d 793 (Tex. Sup. 1980). A copy of said opinion and order is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court below was entered on July 16, 1980. Rehearing was sought, but refused on September 12, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257(3).

BRIEF STATEMENT OF THE NATURE OF THE CASE

This is a sex discrimination and denial of due process case wherein an unwed father was denied parental rights to his illegitimate infant daughter by the Texas Family Code, in violation of the equal protection clause and due process clause of the 14th Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal turns on the 14th Amendment to the United States Constitution, and provisions of Chapters 11, 12 and 13 of the Texas Family Code, all of the pertinent parts of such laws being set out in the appendices of this brief.

STATEMENT OF THE CASE

Petitioner, as an unwed father, tried to obtain of parental rights to his daughter by following the Texas statutory procedure to legitimate the child. However, neither the mother nor adoption agency would give "consent" for such, so Petitioner was required to obtain the court's "consent" by application of the "best interest" of the minor test imposed by statute. Petitioner raised his objections to this differential treatment based on the constitutional guarantees of Equal Protection and Due Process. The following summary of the record demonstrates his loss of these fundamental rights.

Parties to the Case: **Catholic Charities** filed this suit in the District Court of Harris County, Texas on March

2, 1977 to terminate **Cynthia Ann Tuttle's** parental rights to her daughter, **Tarra Elizabeth Tuttle,** born March 10, 1977, based on the mother's irrevocable affidavit of relinquishment filed in the case. The Petitioner, **James Daniel Oldag** was not named as a party to this suit, nor served with the suit.

After getting "notice"[1] of this suit, the Petitioner came into this suit as a party by filing a motion to transfer this suit to Austin County, Texas, since he had previously been designated the "parent" by interlocutory order in a different suit filed in Austin County, Texas.[2] The trial court denied this motion to transfer.

The case went again to trial on December 5, 1977. **Catholic Charities** live trial pleading was a petition to terminate the mother's parental rights based on her irrevocable affidavit of relinquishment and an allegation that it "would require [Petitioner] prove by a preponderance of the evidence that it is in the best interest of the child . . . for [Petitioner] to be designated the parent of the child." [Tr 43] Catholic Charities abandoned its petition to terminate Petitioner's parental rights since it could not prove any statutory grounds of unfitness.[3]

Petitioner's live trial pleading was a petition for voluntary legitimation and custody of the minor child. [Tr 46-53]

Cynthia Tuttle, the mother's live trial pleading was allegations that Petitioner must prove that it is in the "best interest" of the minor child that he be designated her parent, which she denied. [Tr 41-42]

Evidence at Trial: **Cynthia Tuttle,** at age 15, during the summer of 1976 unhappily became pregnant with **Tarra Elizabeth** incident to a high school romance with **James Daniel Oldag,** age 19. [SoF 23-33] Shortly after **Cynthia** became pregnant, [SoF 23-33] Petitioner left for college at Sam Houston State Teachers College to pursue a decree in coaching after finishing his high school football career at Sealy, Texas. [SoF 34-36]

After a month or so, Cynthia suspecting a pregnancy informed the Petitioner about the situation in September, 1976; they decided to get married even though they had talked about it before the pregnancy. [SoF 60, 84] Petitioner came home from college [SoF 62] and together they informed their respective parents, but **Cynthia's**

parents changed her mind and sent her to Villa Maria, **Catholic Charities'** home for unwed mothers. [SoF 38-39]

While at the Villa, Cynthia and Petitioner exchanged many deeply sensitive and emotional letters declaring their love for each other and the unborn child and Petitioner's desire to "help" the pregnant mother [SoF 112]. Furthermore, each stated their determined intention to keep the baby and resume a life as a family as soon as the baby was born. [SoF 68-69] As a matter of fact, Cynthia repeatedly identified herself in these letters as "Cindy, your wife." [SoF 68,70,71] Unknown to Petitioner, Cynthia's resolve to keep the baby weakened causing her to tell a different story to her parents and social workers. [SoF 87]

State's Unequal Treatment of Unwed Fathers: On March 10, 1977, the minor child was born. It was Cynthia's free choice whether to keep the baby or give it away for adoption [SoF 44,47], but counseling by Villa Maria convinced her to give it away for adoption. [SoF 58] Consequently, she signed an affidavit for relinquishment of her parental rights.

Villa Maria, a licensed agency of the State of Texas guided by the Welfare Department's Rules and

Regulations [SoF 182], made it clear to Cynthia that she had the free choice to give the baby away or keep it as a "parent". In order tc keep it, she did not have to go to Court to prove fitness, best interest of the child, or anything else. [SoF 90] This was confirmed by Linda Adams, social worker for Catholic Charities [SoF 146-148] who also testified that the father is treated unequally and differently; he has got to go to Court. [SoF 148-149]

Mary Thomas, a social worker, went further to state adoption agencies considered in order of priority, firstly, the unwed mother's rights to the child, and, secondly, the infant's welfare as far as adoption is concerned, but, at no time, give the unwed father any rights or consideration. [SoF 313-315]

Best Interest of Minor Child: After a prima facie case of termination of **Cynthia Tuttle** was made, the rest of the evidence adduced at the trial pertained to "the best interest" of the child as presented to the jury in Special Issue No. 2.[4] A detailed recitation of this evidence is not necessary to this appeal, so a very general summary

will be given. Catholic Charities presented several social workers and psychiatrists all giving their opinions about the "best interest" of an infant as it related to choosing between the natural father and adoptive parents. It is sufficient to state here, that the social workers and psychiatrists all testified that adoptive parents are "best" qualified to raise a child than any natural parent who is single and 20 years old. [SoF 117-172; 179-216; 244-303]

The Petitioner's life history was unfolded viz-a-viz his own testimony (SoF 345-467], family photos, the testimony of his father [470-509], mother [SoF 515-534] and sister [SoF 512]. It was shown that Petitioner was part of a close family unit including at least three generations. He was a Boy Scout, played football in high school and graduated. He is a hard worker, saves his money and lives at home sharing in the responsibility of caring for his neice and nephew.

Sole Issue of "Best Interest": The trial judge's rulings caused this case to be tried only on the issue of the best interest of the child to designate Petitioner as a parent as presented to the jury in Special Issue No. 2.[4]

The Supreme Court of Texas has upheld the trial court's rulings. Notwithstanding this, the Petitioner made his motion for a directed verdict as to the paternity of the minor child after the parties rested on the grounds that it had been judicially admitted that he was the natural father of the child and none of the Respondents had pled or offered any evidence that he was unfit to be the parent of the child. [SoF 597, 598] The court overruled the motion. [SoF 598]

After the close of all of the evidence by all of the parties, the Petitioner presented to the trial court his requested Special Issue No. 1, "Do you find from a preponderance of the evidence that James Daniel Oldag is fit to be a parent to Tarra Elizabeth Tuttle?" to be included in the jury charge. [Tr 866]

Still going further have equal rights to his child, the Petitioner presented to the court his requested Instruction No. 1 concerning equal rights as follows:

> "In determining these Special Issues, you shall consider the circumstances of James Daniel Oldag without regard to his sex as a parent. You are instructed that the rights of the father and the mother are equal with respect to their child unless and until such rights are waived and relinquished." [Tr 67]

Both the requested Special Issue and the requested Instruction were denied by the Court as being irrelevant and immaterial. [Tr 66-67]

ARGUMENT AND AUTHORITIES

The Petitioner presses his constitutional attack here because Section 13.21 of the Texas Family Code deprived him of his parental right as an unwed father to his natural child under a different standard than applied to mothers and married fathers. Parental rights which inure from the parent-child relationship are rights that are not only Constitutionally protected, but also deemed "essential to the orderly pursuit of happiness by free men", Meyer v. Nebraska, 262 U.S. 390 at 399, 43 S. Ct. 625, 67 L.ed. 1042 (1923). This Court has held that "marriage and procreation are fundamental to the very existence and survival of the race", Skinner v. Okahoma, 316 U.S. 535 at 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

Mr. Justice Goldberg, in his concurring opinion in Griswold v. Connecticut, 381 US. 479 at 495, 85 S. Ct. 1678, 14 L. Ed. 510 (1965) stated with respect to the parental right that:

> "The entire fabric of the Constitution and the purposes that clearly underline its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected . . . As the Ninth Amendment expressly recognizes, there are personal rights such as [these] which are protected from abridgment by the Government though not specifically mentioned in the Constitution."

It is clear that the Constitutional protection of these fundamental rights is not to be denied to a person by the State on the basis of marital status. In Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L.Ed 2d 349 (1971), this Court recognized that:

> "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion in to matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Section 13.21, as applied to this Petitioner as well as men similarly situated, violates his constitutional right to equal protection guaranteed by the Equal Protection Clause of the 14th Amendment to the United States Constitution as explained in Stanley v. Illinois, 405 U.S. 645 (US. Sup. Ct. 1972) as well as due process of law guaranteed under the Due Process Clause of the 14th Amendment.

The Texas voluntary legitimation statutes (Subchapter A of Chapter 13, Texas Family Code) requires that an unwed father who wishes to have parental rights to his illegitimate child must file a petition to legitimate and Statement of Paternity[5], as well as obtain the "consent" to legitimate from either the mother, the managing conservator[6] or the Court. Since the mother and Catholic Charities refused to consent to his parental status, the Petitioner tried to obtain "consent" from the Court pursuant to Section 13.21(c) which provides:

> "The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator." [Emphasis added.]

In cases of "unwilling" unwed fathers, Subchapter A of Chapter 13 provides for paternity suits (otherwise, meaning involuntary legitimation) to force him to accept his parental role and support duty. Thus, the Texas Legislature prescribed a statutory procedure for the legitimation of illegitimate chidren in (1) cases where the nature father was willing, i.e. Section 13.21 of Subchapter B, and (2) cases where the father was

unwilling, i.e. Section 13.01 through 13.09 of Subchapter A. Naturally, the whole stated purpose behind Chapter 13 is to establish the legal parent-child relationship between an unwed biological father and his child. Presumably, the need to legislate these statutes was influenced by this Court's decision in Gomez v. Perez, 466 SW2d 41 (C.C.A. 1971 writ ref'd, N.R.E.), rev'd 409 U.S. 535, 93 S.Ct. 872, 35 L. Ed 2d 56 (1973). In view of the Gomez v. Perez case, supra, Chapter 13 was needed because Section 11.01(3), 12.02(a) and 12.02(c) of the Texas Family Code excludes all classes of unmarried fathers from the definition of "parent" and thus denied them and their children equal treatment as given to mothers, married fathers, and legitimate children.

The Texas Supreme Court held that Petitioner has the burden to obtain "consent" by proving to the Judge and Jury that it is in his daughter's "best interest" that he be designated her parent. In this connection, the Texas Supreme Court said:

> "The Texas Family Code recognizes that the individual child's interest is paramount in each contested voluntary legitimation case. The validity of the "Best Interest Rule" was specifically approved by the United States Supreme Court in Quilloin v. Walcott."

It is recognized by the Texas Family Code and Texas Courts that no such burden of best interest, when obtaining the designation of "Parent", is placed upon any class of mothers and married fathers. Furthermore, and significantly, no burden of "best interest" is raised against unmarried fathers under Chapter 13, Subchapter A, (providing for involuntary legitimation), if that natural father is unwilling to sign a statement of paternity designating himself to be the natural father.[7]

Constitutional Standard of Equal Rights & Due Process

Equal Rights: With its gender-based provisions forcing an unequal and discriminatory treatment of all unwed fathers as contrasted to all women and married fathers, Section 13.21 does not meet the constitutional requirements of the Equal Protection Clause of the 14th Amendment, and the Due Process Clause, United States Constitution.

In testing the constitutional strength of Sections 11.01 and 13.21 to insure "equal rights" and "due process" to all citizens who are fathers and mothers in Texas, the standards recently announced by this Court in Caban v. Mohammed, 441 U.S. 380, 60 L Ed 2d 297, 99 S Ct

1760, must be applied. This Court in the Caban, supra case struck down on constitutional claims, the New York domestic relation statute Section 111 which allowed unwed mothers to withhold consent for adoption thereby blocking adoption of their children, whereas unwed fathers could not block adoption by withholding consent.

In the Caban supra case, the unwed father:

> "press[ed] two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the 14th Amendment. Second, Appellant contends that this Court's decision in Quilloin v. Walcott, 434 U.S. 246, 54 L Ed 2d 511, 98 S Ct 549 (1978) recognized the due process right of natural fathers to maintain a parental relationship with their children, absent a finding that they are unfit as parents." at pages 302-303

Once these claims were made to this Court, it was incumbent upon it to review Section 111 of the New York Domestic Relations Law to determine whether it did in fact treat an unmarried parent differently according to their sex, which they did, and accordingly, found to be a sex-discrimination law. However, Section 11.01, 13.21 and 12.02 of the Texas Family Code need not be subject to such intensive scrutiny because its equal treatment of unwed fathers as contrasted to unwed mothers is

recognized by the Texas Supreme Court in this case[8] and In the Interest of K, supra, 535 SW2d 168 (Tx S. Ct. 1976)[9].

This Court upheld Caban on his Equal Protection claim in striking down the New York statute:

> "The effect of New York's classification is to discriminate against unwed father's even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment to the fate of their children. Section 111 both excludes some loving fathers from full participation on the decision whether their children will be adopted and at the same time, enables some alienated mothers arbitrarily to get off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the state's asserted interests." page 308.

In reaching this decision, this Court "rejected the claim that the broad, gender-based distinction in Section 111 (distinction between unwed fathers and unwed mothers) is required by any universal difference between maternal and paternal relations at every phase of the child's development" at page 305. However, the majority of the Texas Supreme Court body contradicts this teaching in its opinion:

> "We believe that in the light of the 'special difficulties' a mother faces at the birth and during the infancy of an illegitimate child, this slight legislative distinction is justified," at page 797
>
> "The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child, will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father," at page 797.

This language is clearly and simply incantation of the belief that mothers have special rights to their children but fathers do not. The Texas Supreme Court's opinion focuses attention on the State's claimed substantial interest promoting the best interest of children born out of wedlock by encouraging mother's to make proper decisions as to the deposition of the child — Does this "important State's interest" bear any substantial relationship to the State's interest that parental status should be conferred only on parents where it is in the best interest of the child? The practical effect of Section 13.21 is to discourage the voluntary recognition of parental obligations by willing unwed fathers due to the tougher standard applied to them as opposed to any other natural antecedent. If the "best

interest" of the child is the important State's interest, then it should say it has the same and equivalent State's interest to determine that all mothers and fathers serve the "best interests" of their child as the unwed father must show, before they are given parental status. However, the State disclaims any "interest" in determining if unwed mothers and married fathers serve their child's best interest since Section 11.01(3) gives them parental status by definition, and without proof of best interest. The Supreme Court says:

> "The narrow issue before us is whether the gender-based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective."

Although the above declaration of state's interest says the State is interested in children born out of wedlock, that interest in statutorily directed only against the unwed father. Furthermore, is it proper for the State to intervene into the private lives of people by claiming that it has an "important state interest" in requiring that any natural parent must show that he can serve the best interest of his child, above all other persons,

before he is given parental rights to his offspring? If so, this case is the first time that such right has been recognized and approved as superior to the fundamental right to bear and raise a family.

Due Process: Caban, contended as mentioned earlier, that "Quillon v. Walcott 434 US. 246, 54 L Ed2d 511, 98 S CT 549 (1978) recognized the due process right of natural fathers to maintain a parental relationship with their children, absent a finding that they are unfit as parents," at page 303.

The Texas Supreme Court had this exact point presented in the instant case for decision — that is, the issue of whether a natural unwed father has a substantive parental right to his child, to give meaning to the heretofore "empty" procedural right given in Stanley v. Illinois, 405 US 645, 31 L Ed 2d 551, 92 S Ct. 1208 (1972) to have notice of and participate in a hearing determining his child's future. So far, each of the following classes of biological relations has a recognized enforceable substantive "parent-child" right without "Best Interest" test imposed against them:

1. Illegitimate children to their natural fathers, Gomez v. Perez, supra held: "We, therefore hold that once a State posits a judicially enforceable right on children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." page 60

2. Natural mothers to their illegitimate children.

3. Fathers and mothers to their legitimate children - Section 11.01 and Section 12.04

4. Unwilling fathers to their illegitimate children - Section 13.08-13.09

In Stanley, supra, the Court said "that a father's interest in the companionship, care, custody, and management of his children is cognizable and substantial and the State's interest in caring for the children is de minimis if the father is in fact a fit parent," page 651, 657-658. Also, the same idea was repeated in Quilloin, supra, at page 515. In Quilloin, this Court repeated that "it is now firmly established that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the 14th Amendment." page 519. Adding to this principal, this Court said further, "We have little doubt that the Due

Process Clause would be offended if a State were to force the break-up of a natural family over the objections of their parents and their children, without some showing of unfitness, and for the sole reason that to do so was thought to be in the children's best interest" page 520.

As a final coup d'grace upon the constitutionally infirmed Section 13.21, Justice Stevens in his Caban dissent said:

> "I assume that if and when one develops [substantial due process of father's right to parent status absent a finding of unfitness] the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process" citing Stanley & Quinton, page 321

However, the Caban case did not stop here — it further stated "no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under Section lll bears substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children," at page 308.

Has the majority of the Texas Supreme Court found any such showing made by the State? The majority says:

> "To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother."

This reasoning of the Supreme Court is defective because it assumes that adoption will be promoted by discriminating against unwed fathers. This Court in addressing this point said:

> "We find that the distinction in Section lll between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate chlidren. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the Appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers, nor is there any self-evident reason why as a class they would be." at page 306-307, Caban supra

The Texas Supreme Court failed to mention the powerful club given unwed mothers and adoptions agencies which they can use to discourage a willing unwed father from trying to assert his moral and natural right to his child. The Texas Supreme Court presumes unwed fathers to belong to the class characterized by "sperm donor, a

rapist, a hit and run lover, an adulterer and the like . . ." at page 797 and must therefore prove that he does not belong to such class. There is no self-evident reason to say unwed men should be presumed to belong to a class of social offenders just as there is no self-evident reason to presume that all unwed women belong to the class of good mothers. The Caban case said:

> ". . .such a statutory 'classification' must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" at page 306.

The class that the mother and father fell in as presented in this case is—unwed parents. There was not one thing left in the Petitioner's power to do in furtherance of his moral and legal committment to his child that he has not done.

On the other hand, Respondents collectively have taken every opportunity since the birth of the child to hinder the Petitioner from exercising any father-child relationship with his daugher — and this, being done with the full cooperation of the rules and regulations of the Texas Welfare Department applied by its licensed agency.

These facts are significant because it shows the paternal love and interest backed up with action the Petitioner has taken in his daughter. Only in Quilloin supra where the father had declined for 11 years to petition to legitimate his child and shoulder the burden of the care, custody and support of his child, did the Court allow the State's "best interest" of the child weigh heavier than the unwed father's parental rights flowing from the "Due Process Clause." But, the Court in Quilloin equated the "best interest" of the child with giving full recognition to a family unit, page 520. In Petitioner's case, the only family unit existing is that between Petitioner and his daughter. Neither of the Respondents contend that Tarra Elizabeth is a member of anybody else's family.

How Far Do Constitutional Infirmities Cut Into the Texas Family Code: The Petitioner here does not attack the entire provisions of Section 13.21 — only Section 13.21 (b)(3) and (c).

There is a valid state interest in securing proof of biological fatherhood and paternity as recognized in

Gomez v. Perez, Trimble v. Gordon, 430 US.. 762, 52 L Ed 2d 31, 97 S Ct. 1459. The proof is self-evident in the case of mothers, because (so far) nature indicates the female to give birth. Once the Section 13.21 (b)(3) and (c) are eliminated, the remaining part of Section 13.21 would enable willing fathers to assume parental status after (1) they come forward timely to petition for same and (2) proof of biological fatherhood.

In the event that an unwed father is "unfit" to maintain parental status, Section 13.21 (d) already provides grounds for termination.

Certainly this application of the Section 13.21 was the one Justice Pope urged in his dissent in In the Interest of K supra and Justice Steakley urged in his dissent in the instant case.

Proper State Interest: Excising the suggested sub-sections from the section with the sharpness of a constitutional scalpel would promote the legitimation of children rather than hinder it. Natural unwed fathers who want their children would know they have the same chances to claim and keep their children as any one

else. On the other hand, unmarried mothers can no longer have babies with the certain knowledge that the father is at their whim and caprice as to his relationship with the child. It seems that a full recognition of unwed fathers rights to his child could be an important additional solution to the problem of illegitimacy.

PRAYER

Petitioner prays as follows:

1. That United States Supreme Court grant this Writ of Certiorari and upon review of the decision below, hold Section 13.21 (b)(3) and (c) of the Texas Family Code unconstitutional;

2. Judgment be entered reversing the decision of the Texas Supreme Court;

3. The Supreme Court should remand this case for further proceedings consistent with the decision of the Court.

4. The Supreme Court should order Respondents to pay all costs of appeal.

Respectfully submitted,

ELICK & ELICK

JOHN V. ELICK
Attorney for Petitioner
Post Office Box 803
Two East Main
Bellville, Texas 77418
713/865-3647
Texas Bar #06521000

SIDNEY LEVINE
110 Main Street
Sealy, Texas 77418
713/865-2989

FOOTNOTES

1. Catholic Charities gave "notice" to Petitioner as influenced by the Stanley v. Illinois 405 U.S. 645, 92 S. Ct. 1208, 31 L Ed 551 (1972) and as provided in Section 11.09(a)(9).

2. By coincidence, Petitioner filed a suit in the 155th Judicial District Court of Austin County, Texas seeking to voluntarily legitimate his daughter, on the same day that Catholic Charities filed this suit in Harris County, to March 21, 1977. The Texas Supreme Court held that the Harris County suit obtained continuing jurisdiction of the parties first since the Harris County suit was filed two hours prior to the Austin County suit, therefore invalidating the Austin County suit.

3. Texas Family Code, Section 15.02 provides the statutory grounds for termination. See Appendix "B".

4. Special Issue No. 2 - "Do you find from a preponderance of the evidence that it is in the best interest of the child, TARRA ELIZABETH TUTTLE, that this Court designate JAMES DANIEL OLDAG her parent?" ANSWER: "He should not be designated her parent."

5. Section 13.21(a) and 13.22 Texas Family Code.

6. Catholic Charities was unilaterally appointed managing conservator for the motion as allowed in Section 15.03(c) Texas Family Code.

7. In cases of this class, the Texas Family Code says:

13.08(A) "On a verdict of the jury, or on a finding of the court, if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child."

Section 11.03 apparently allows a suit for involuntary legitimation to be brought "by any person with an interest in the child", which is contrasted to the voluntary legitimation suit which apparently can be brought only by "the father, or mother of the child, or the State Department of Public Welfare," Section 13.21(a). Hence, upon proof of biological fatherhood, under Section 13.08 (involuntary legitimation) it is the trial Court's mandatory duty to enter a decree of parent-child relationship.

8. Majority opinion recognized this "slight" legislative distinction of applying "Best Interest Rule" against unmarried fathers at page 797 — the dissent forcefully said "I certainly cannot agree with the assertion by the majority that the difference in the statutory treatment of unwed father and mothers is 'slight.'" at page 800.

9. Justice Pope pointed out the most obvious discrimination in his dissent at page 171-172.

APPENDIX A

IN THE INTEREST OF T. E. T.

NO. B-8721

Supreme Court of Texas

July 16, 1980

Rehearing Denied Sept. 12, 1980.

BARROW, J.

This suit was brought by Catholic Charities of the Diocese of Galveston-Houston to terminate the parent-child relationship of an infant illegitimate girl (T.E.T.). The biological father filed a cross-action seeking to legitimate the child and be awarded custody. The trial court rendered judgment on the jury verdict[1] that (1) the

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[1]The jury found substantially as follows:

> No. 1. "We do" find that it would be in the best interest of the child to terminate the parental rights of the mother.
>
> No. 2. We find that it is in the best interest of the child that the father "should not be designated her parent." (Emphasis added.)

parent-child relationship between the mother and T.E.T. be terminated; (2) the father's petition to legitimate T.E.T. be denied and all of his rights to the child be foreclosed; and (3) Catholic Charities be appointed managing conservator of T.E.T. The biological father appealed and the court of civil appeals affirmed. 583 SW2d 484.

The primary question presented is whether portions of the Texas Family Code deny equal protection as guaranteed by the United States Constitution[2] to the biological father who has not established a substantial family relationship with the illegitimate child. We hold that the Family Code does not violate this constitutional guarantee and affirm the judgments of the courts below.

The child, T.E.T., was born in 1977. T.E.T.'s mother was fourteen and a freshman in high school and T.E.T.'s

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[2]Petitioner does not address the question of the application of the Texas Equal Rights Amendment. See Article 1, Section 3a, of the Texas Constitution.

father was eighteen and a senior in the same school when the child was conceived. They were not married and, in fact, the girl was forbidden by her parents to have dates alone with a boy before she reached sixteen years of age. After much consideration and discussion of her alternatives with her parents and the father, the pregnant girl went to a home for unwed mothers operated by Catholic Charities. After additional counseling with respect to keeping the child or permitting its adoption, the mother concluded that it was in the best interest of the child to relinquish her parental rights and allow the child to be adopted. After T.E.T. was born, the mother executed an Affidavit of Relinquishment of Parental Rights, pursuant to Section 15.03.[3]

Under the Family Code the parent-child relationship is a legal status which carries with it certain rights,

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[3]Unless otherwise noted, references to sections are to sections of the Texas Family Code.

privileges, duties and powers. This status does not necessarily exist between mother or father and child, but rather exists between a "parent" and child. A "parent" is defined in Section 11.01(3):

> "(3) 'Parent' means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated."

Section 12.02 describes when a child is the legitimate child of his father as follows:

> "(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.
>
> "(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.
>
> "(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code."

Chapter 13 of the Family Code authorizes the biological father of an illegitimate child to establish his status as a parent as follows:

> "§ 13.21 Voluntary Legitimation
>
> . . . .

"(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

. . . .

"(3) the mother or the managing conservator, if any, has consented to the decree.

"(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator."

This Court recently upheld the constitutionality of the statutory procedure in question. See In the Interest of K, 535 SW2d 168 (Tex.), cert. denied, 429 U.S. 907, reh. denied, 429 US 1010 (1976). We said:

> "There is a rational basis for the state, which has an interest in securing stable homes and supportive families for children, to distinguish between the father who has accepted the legal and moral commitment to the family and the father who has not done so. The biological father may be a sperm donor or a rapist or someone as S.D.A. who has simply engaged in a single hit and run sexual adventure. He may, on the other hand, be devoted to child and family even though the legal contract has not been sealed. Texas law offers the biologic father of an illegitimate child the opportunity to prove which category in which he falls and to show that he should not be treated differently from fathers legally committed to the mothers of their children. Thus S.D.A. sought and received a fair hearing. The evidence proved him to be an unfit person to act as parent of this child, and the denial of his petition for parental status was shown to be in the best interest of the child. His rights have been respected. The rights of society and baby girl K permit him nothing more."

Petitioner urges that our holding should be re-examined in view of the writing of the United States Supreme Court in Craig v. Boren, 429 U.S. 190, 97 S Ct 451, 50 L Ed 397, (1976), and in Caban v. Mohammed, 441 U.S. 380, 99 S Ct 1760, 60 L Ed 297, (1979). These cases are distinguishable and do not mandate a holding that the Texas Family Code denies that biological father of an illegitimate child the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

In Craig v. Boren, supra, the United States Supreme Court held that an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under eighteen constituted a denial to males eighteen to twenty years of age of the equal protection of the laws in violation of the Fourteenth Amendment. The Supreme Court did not strike down all gender-based classifications, but simply required that such a classification serve important governmental objectives and be substantially related to achievement of these objectives.

In Caban v. Mohammed, supra, the United States Supreme Court by a 5-4 vote struck down as unconstitutional the gender-based distinction in the New York adoption consent statute between an unwed mother of the child and the unwed biological father. Under the New York law, an unwed mother could veto an adoption, but an unwed father could not, even if the adoption by the biological father was in the child's best interest. The Court made it clear that its Caban opinion must be read in the light of the unusual circumstances of the case.

There the unmarried parents had lived together for five years as husband and wife, during which period two children were born to them.[4] They then separated and the mother married Mohammed. Eventually Mohammed sought to adopt the children with the mother's consent. The facts of the Caban case illustrated the injustice of that discrimination as applied to parents who had lived as a family unit for years.

The limited extent of the Caban holding is emphasized by the issue as drawn by the dissent of Justice Stevens:

> "With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an older child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity...."

The majority itself states:

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[4]Under Texas law, the children could have been declared legitimate children since they were born of the purported common law marriage. See Section 12.02(b).

> "Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in §111. In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child...."

The Caban Court carefully pointed out that appropriately limited distinctions between the rights of the mother and the rights of the father are not necessarily improper. In fact, by a footnote, the Caban opinion added this qualification: "We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests." (Emphasis added.)

The Texas voluntary legitimation statutes differ from the New York statute in that our Family Code does give the biological father reasonable opportunity

to establish his status as a "parent." Once this is done, he has equal rights with the mother who is identified as the child's parent at birth. Section 13.21 provides in part that the court shall render a decree designating an illegitimate child as the legitimate child of its father and the father as a "parent" if the mother or managing conservator has consented to the decree, or in the absence of such consent, if the court finds that such decree is in the best interest of the child. Section 13.09 provides that the effect of a decree designating the alleged father as the "parent" of the child is to create the parent-child relationship with the child as if the child were born to the father and mother during marriage. The father then has the same rights, privileges, duties and powers as the mother. Thus it is seen that, contrary to the New York statute, a mother cannot veto the father's acquisition of full parental right.

A similar distinction was noted by the California court recently in rejecting the contention of a biological father that under the Caban holding the California adoption statute denied him the equal protection guaranteed by the Fourteenth Amendment. The Court

pointed out that California (like Texas) grants the biological father an opportunity to establish by the best interest rule his status as a parent. W. E. J. v. Superior Court of Los Angeles, 100 Cal.App.3rd 303, 160 CAL Rptr 862, CAL App. 1979), (Hearing denied by the California Supreme Court, 1980).

The Texas Family Code recognizes that the individual child's interest is paramount in each contested voluntary legitimation case. The validity of the "best interest rule" was specifically approved by the United States Supreme Court in Quilloin v. Walcott, 434 U.S. 246, 98 S Ct 549, 54 L Ed 2d 511 (1978). In Quilloin, the Supreme Court unanimously upheld a Georgia statute which permits the biological father to legitimate his child only upon a showing of best interest of the child. It should be noted that the Georgia Code is very similar to the Texas Family Code regarding the rights of the father of an illegitimate child. Although the Supreme Court did not there consider a gender-based distinction, Quilloin rejected the contention that the equal protection clause requires that all biological fathers be treated equally. The Supreme Court expressly held that the

Georgia statute conferring upon the fathers of legitimate children the right to veto adoption of the children while denying that right to the fathers of illegitimate children did not violate the equal protection clause.

The narrow issue before us is whether the gender-based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective. We hold that it is so related. We believe that in the light of the "special difficulties" a mother faces at the birth and during the infancy of an illegitimate child this slight legislative distinction is justified. See Caban v. Mohammed, supra.

We pointed out in K that there is a rational basis for the State to distinguish between the father who has accepted the legal and moral commitment to the family and the father who has not done so. The Caban holding, as heretofore pointed out, is supported by the fact that the father there had established a family relationship with the children. The State has a valid

objective in requiring the biological father to establish his "status" as a parent. Otherwise, we would recognize a sperm donor, a rapist, a "hit and run" lover, an adulterer and the like in the same legal status as a father who had accepted the legal and moral commitment to his family. While recognizing this valid distinction, Texas law offers the biological father of an illegitimate child the opportunity to prove in which category he belongs.

Furthermore, the State has a legitimate interest in protecting the children who are born as a result of pre-marital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or she may carry it full term. The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute

is substantially related to the achievement of that interest.

On the other hand, the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. He may not promptly disclose his interest in the child. In most situations, he can wait until after the child is born before committing himself. While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen-year-old high school freshman has a serious problem when she discovers she is pregnant and she needs all the options that the State can properly make available to her.

It is easy to understand her decision here that it would not be in the child's best interest for her to be turned over to the nineteen-year-old father and be reared

by him in the small town where the illicit sexual activity occurred. On the other hand, the best interests of the illegitimate child will more likely be served by her adoption into a family who will give her the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which an illegitimate child suffers.

The biological father was given timely notice of the proceedings to terminate the mother's parental rights and, in response, brought suit as permitted under the Texas Family Code to legitimate the child. He thus had the procedural due process required by Stanley v. Illinois, 405 U.S. 645, 72 S Ct 1208, 31 L Ed 2d 551 (1972). A full and complete trial was had on the question of whether it was in the child's best interest that the child be legitimated. The jury found that it was not in the child's best interest and no complaint is made as to the sufficiency of the evidence to support such finding. Our facts differ sharply from those in Caban as the biological father here had never had a family relationship with the child. In fact, he had never lived with, raised, or established any kind of relationship with the child,

having seen her only the one time shortly after her birth.

We hold that Section 13.21(b)(3) and (c) of the Family Code do not deny to the biological father, who has not established a substantial family relationship with the child, the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner urges by several points of error that the court of civil appeals erred in not reversing the judgment of the trial court and remanding the cause for a new trial because of certain procedural errors in the trial of the case. These complaints are primarily based on his contention that the mother and Catholic Charities were not antagonistic parties and the trial court should not have given each party six jury strikes and additional time for jury argument. The problem with this contention is that the cause began as a suit by Catholic Charities to terminate the parent-child relationship of the mother. This issue remained in the case and was submitted to the jury. Nevertheless, these parties were united by their pleadings and in spirit against the petitioner's petition for paternity and custody. The

mother and Catholic Charities have been represented by unrelated attorneys throughout the cause and there is no indication in the record of any collaboration either in the selection of the jury or in the presentation of the argument to the jury.

We agree with the court of civil appeals that the question of the number of jury strikes was not properly preserved by petitioner. Although inquiry was made by petitioner of the trial court as to how many strikes each party would be entitled to make, there was no objection by him upon explanation by the trial court that each of the parties would be entitled to six strikes. Thus, petitioner waived any complaint to this alleged error.

We also agree with the court of civil appeals that reversible error has not been shown by the other procedural errors asserted by petitioner.

The judgment is affirmed.

DISSENTING OPINION

STEAKLEY, Justice, dissenting.

I respectfully dissent.

I agree that the state may constitutionally require an unwed father to establish that he is the biological

father, a burden understandably not required of the unwed mother. But when the father has demonstrated this concern for and interest in his child, it is my opinion that he is thereafter entitled to the constitutional guarantee of equal protection. This is denied him by Section 13.21[1] of the Texas Family Code under

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[1] §13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the State Department of Public Welfare may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and,

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

which the unwed mother may withhold consent and thereby require the father to discharge the additional burden of establishing that recognition of his fatherhood would be in the best interest of the child.

The statutory scheme of the Texas Family Code in question makes two gender-based distinctions. In the first place, the effect of Sections 11.01(3), 12.01 and 12.02[2]

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[2] Section 11.01.

(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

Section 12.01.

A child is the legitimate child of his mother.

Section 12.01.

(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before during the attempted marriage.

(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code.

is that a child is legitimate to its unwed natural mother, but illegitimate to its unwed natural father. This classification serves and is substantially related to the governmental objective of maximizing accuracy and certainty in the determination of paternity of a child born out of wedlock. It recognizes the biological fact that the woman carries and gives birth to the child, while the man's biological role ends at conception. The larger sphere of physical possibilities for the identity of the child's natural father logically requires that paternity be established by factual proof, such as medical testimony of genetic compatibility and physical access.

Additionally, Sections 13.21(b)(3) and 13.21(c) require either that the natural mother or the managing conservator consent to legitimation or, in the absence of such consent, the trial court consent, if it finds that legitimation is in the best interest of the child. The statutory consent requirement distinguishes between men and women by requiring an unmarried man who has factually established that he is the natural father of the child to clear yet another hurdle of obtaining consent.

In the event the court's consent is necessary the natural father must carry the additional burden of proving that legitimation is in the best interest of the child. The State places no corresponding burden on the natural mother.

The majority's reliance on Quilloin v. Walcott, 434 U.S. 246, 98 S Ct 549, 54 L Ed 2d 511 (1978) and In the Interest of K, 535 SW2d 168 (Tx. 1976) is misplaced. Because the father in Quilloin, supra failed to preserve the gender-based equal protection argument, id. n. 434 U.S. at 253, n. 13, 198 S Ct at 554 n. 13, the Supreme Court only discussed the disparate treatment between unwed fathers and married fathers. In the Interest of K, supra was decided before Craig v. Boren, 429 U.S. 190, 97 S Ct 451, 50 L Ed 2d 397 (1976) and Caban v. Mohammed, 441 U.S. 380, 99 S Ct 1760, 60 L Ed 2d 297 (1979) which make clear that gender-based classifications must serve important governmental objectives and be substantially related to the achievement of those objectives. The rational basis test used in In the Interest of K, is no longer relevant to the gender-based classification at issue here.

I point out further that In the Interest of K, relied on In re Adoption of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511, 311 N.E. 2d 486 (1975), in ruling that the Texas Family Code did not deprive an unwed father of the equal protection of the law. But the U.S. Supreme Court in writing Craig v. Boren, supra, and Caban v. Mohammed, supra, said this about Orsini:

> In Orsini v. Blasi, supra, [423 U.S. 1042, 96 S Ct 765, 46 L Ed 2d 642] the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. See Hicks v. Miranda 422 US 332, 344,45 L Ed 2d 223, 95 S Ct 2281 (1975). At the same time, however, our decision not to review fully the questions presented in Orsini v. Blasi is not entitled to the same deference given in ruling after briefing, argument, and a written opinion. See Edelman v. Jordan, 415 US 651, 671, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Insofar as our decision today is inconsistent with our dismissal in Orsini, we overrule our prior decision.

Caban, supra, 441 U S at 390, n. 9 99 S Ct at 1767 n. 9.

Further, citing Craig v. Boren, supra, the U.S. Supreme Court stated in Caban that to withstand judicial scrutiny under the Equal Protection Clause of the

Fourteenth Amendment gender-based distinctions must serve important government objectives and be substantially related to achievement of those objectives. The Court wrote:

> Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.
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> Appellant Caban, appellee Marie Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children. There is no reason to believe that the Caban children -- aged 4 and 6 at the time of the adoption proceedings — had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at ever phase of a child's development.
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> . . .
>
> The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the

> stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111. Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further these ends.
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> . . .
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> We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children.

Id. at 389-91, 99 S Ct at 1776-1977.

The majority discusses the opportunities for the unwed father to avoid automatic responsibility for the child, an option not biologically available to the unwed mother. It should be emphasized that in this case the natural father repeatedly attempted to establish a relationship with the child, and, indeed, was permitted some limited visitation with her. Moreover, there are letters in the record written by the mother to the father that led the father to believe that it was her wish that the father have the baby. However, the father's access to the child was discouraged and limited by the adoption agency, which has physical possession of the child at the request of the mother.

In my view, the discrimination against the unwed father in the Family Code is not justified by the promotion to any substantial extent of the State's objectives mentioned by the majority; and I certainly cannot agree with the assertion by the majority that the difference in the statutory treatment of unwed fathers and mothers is "slight."

I am in accord with the rationale of the Supreme Court of Missouri in J.D.S. v. Edwards, 574 SW2d 405, (Mo. 1978) en banc. In J.D.S., an unwed father sought custody of his illegitimate son. The mother had relinquished her parental rights and given the child for adoption. In formulating a standard to determine the unwed father's substantive due process rights, the Court stated:

> . . . A legislative recognition of married fathers' presumption of fitness is manifest in the high level of proof required by the statute to support a finding of unfitness as to them. However, we believe that an unwed father initially has no such strong presumption of parental fitness. The State is not constitutionally required to accord such presumption. Instead the State is free to require an unwed father first to prove that he has seasonably demonstrated a meaningful intent and a continuing capacity to assume responsibiltiy with respect to the supervision, protection and

> care of the child, and the trial court in these proceedings should at the outset examine the extent of such parental concern and capacity as may have been demonstrated by the putative father. On a finding of such concern and capacity, the father is then cloaked with the benefit of the presumption of fitness essentially the same as that enjoyed by other parents and the burden becomes the petitioner's to show by "clear, cogent and convincing evidence," unfitness, waiver or other disqualification of the sort described in § 211.441, RSMo 1969.

Id. at 408-09. The Court recognized that Quilloin approved the "best interests of the child" standard but rejected it in favor of a more lenient standard under the Missouri Constitution.

> . . . This standard [best interest] presents the difficulty that an unwed father, though he may have shown great parental concern, must compete with adoptive parents to establish not only that he is a suitable parent (i.e., meeting a charge of unfitness), but also that he is the most suitable of those seeking custody of the children. For those unwed fathers who are fit, and who have demonstrated such parental concern the standard approved by the U.S. Supreme Court in Quilloin seems to represent a diminution of the protection afforded by the due process and equal protection clauses of the United States Constitution set forth in Stanley. We are disinclined to so dilute these important rights. We hold that the Missouri Constitution, art. I, §§ 2 and 10, requires as the appropriate minimum standard that the same presumption of fitness afforded married fathers in parental termination proceedings be afforded to natural fathers after a reasonable showing of fatherly concern in such cases.

Id. at 409.

Finally, I point out that the majority does not address the Texas Equal Rights Amendment which states,

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

TEX. CONST. art. I, § 3a.

This provision has been in the Texas Constitution since 1972. The majority does not decide if the Texas Constitution provides less, greater or the same protection as the Fourteenth Amendment. See Schoen, The Texas Equal Rights Amendment, 15 Houston L. Rev. 537 (1978) where Professor Schoen proposes several tests, and argues that the use of any single test "will undermine the objectives of the Texas ERA." Id. at 586. See also, Sampson, The Texas Equal Rights Amendment and The Family Code: Litigation Ahead, 5 Texas Tech L. Rev. 631 (1972).

Other State Courts have faced the Equal Rights Amendment issue and have adopted rules with which to test the constitutionality of gender-based classifications. The Massachusetts Supreme Court adopted the strict scrutiny test that the United States Supreme Court

utilizes to test laws that affect fundamental rights or make suspect classifications. Thus, in Attorney General v. Interscholastic Athletic Assoc., 393 N.E.2d 284 (Mass. 1979), ___ Mass App ___, that Court held that gender-based classifications must further a demonstrably compelling interest and limit its impact as narrowly as possible consistent with the legitimate purpose. See People v. Ellis, 57 Ill 2d 127, 311 N.E.2d 98 (Ill. 1974). In Commonwealth v. Butler, 458 P 289, 328 A.2d 851 (Penn. 1974), the Court stated that gender can no longer be accepted as an exclusive classifying tool. The Maryland Court of Appeals held that sex cannot be a factor in legislative classifications. Rand v. Rand, 280 MD 508, 374 A.2d 900 (MD. 1977). Washington interprets the Equal Rights Amendment as a prohibition of classifications based on gender. Darrin v. Gould, 85 Wash 2d 859, 540 P.2d 882 (Wash. 1975); Welfare of Jeffrey Lee Hauser, 15 Wash App 231, 548 P.2d 333 (Wash. Ct. App. 1976).

We considered this problem in Mercer v. Board of Trustees, North Forest Independent School District, 538 SW2d 201 (Tex. Civ. App. - Houston [14th District] 1976, writ ref'd n.r.e.). In Mercer, after quoting Darrin v. Gould, supra, the Court wrote:

> We cannot agree with the Supreme Court of Washington that the ERA admits no exceptions to its prohibition of sex discrimination. Any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strictest judicial scrutiny. Any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other consitutionally protected rights such as the right of privacy, or (3) other "compelling reasons." With respect to "physical characteristics" we are simply recognizing the facts of life. For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes. Nor does the ERA require that such rights so established (and so long denied) be enforced where they come into conflict with other basic fundamental constitutionally-protected rights such as that of privacy. To justify a suspect classification by "compelling reasons" places the burden of proof and persuasion on the party defending the classification.

Mercer, supra, at 206. For an analysis of Mercer, see Schoen, The Texas Equal Rights Amendment, 15 Houston L. Rev. 537, 568-72 (1978).[3]

Under Mercer, the Equal Rights Amendment makes gender a "suspect" class and to withstand scrutiny, a

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[3] The sex equality provision of the Texas ERA is not simply window dressing added to the state constitution as a sop for a few overwrought but vocal citizens. Adoption of the Texas ERA, considered in its contemporary social, political, and legal context, is inconsistent with a view that nothing has changed or should change. The law cannot be changed and yet remain unchanged, unless the plain language of the state constitution is ignored. Amending the state constitution is scarcely necessary to preserve the status quo ante, and inclusion of a specific and unqualified guarantee of sex equality seems a peculiar means to perpetuate the sex-based discrimination of the past. Finally, an obvious but occasionally overlooked fact should be noted. When the law imposes burdens, confers benefits, or otherwise distinquishes between persons because of sex, the basis for different treatment, sex, is a characteristic over which a person has no control, an "immutable characteristic determined solely by the accident of birth."

Schoen, 15 Houston L. Rev. at 587. But see the concurring opinion in Darrin v. Gould, supra, where the concurring justice expresses his doubts that the voters intended all of the consequences of the Equal Rights Amendment's adoption.

statute that makes a gender-based distinction must further a compelling interest and represent the narrowest and least restrictive means by which that objective can be achieved. Under the Texas Family Code only unwed father's rights are involuntarily terminated by the best interest of the child standard. All other parents, including the unwed mother, are protected from the involuntary termination of their parental rights by Chapter 15 of the Family Code. Section 15.02 provides that to involuntarily terminate the rights of a parent the Court must find that the parent committed the acts specified in § 15.02. "Parent" is defined in a manner that excludes unwed fathers, § 11.01(3); he is thus not afforded the protection of § 15.02. There is no constitutionally acceptable basis for this discrimination.

POPE AND SPEARS, JJ., join in this dissenting opinion.

APPENDIX B

Section 11.01. Definitions

As used in this subtitle and Subtitle C of this title, unless the context requires a different definition:

. . .

(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) "Parent-child relationship" means the rights, privileges, duties and powers existing between a parent and child as provided by Section 12.04 of this code.

Section 11.03. Who May Bring Suit

A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency.

Section 12.01. Relation of Child to Mother

A child is the legitimate child of his mother.

Section 12.02. Relation of Child to Father

(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his mother and the man.

(b) A child is the legitimate child of his father if at any time his mother and the man have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.

(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code.

SUBCHAPTER A. PATERNITY SUIT

Section 13.01. Time Limitation of Suit

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Section 13.08. Decree

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Section 13.09. Effect of Decree Establishing Paternity

The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father nd the child as if the child were born to the father and mother during marriage.

SUBCHAPTER B. VOLUNTARY LEGITIMATION

Section 13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the State Department of Public Welfare may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservatory, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

Section 13.22. Statement of Paternity

The statement of paternity authorized to be used in Section 13.21 of this code must be executed by the father of the child as an affidavit and witnessd by two credible adults. The affidavit must clearly state that the father acknowledges the child as his child, that he and the mother, who is named in the affidavit, were not married to each other at the time of conception of the child or at any subsequent time, and that the child is not the legitimate child of another man. The statement must be executed before a person authorized to administer oaths under the laws of this state.

Section 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(a) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his

parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

Section 15.03. Affidavit of Relinquishment of Parental Rights

(a) An affidavit for voluntary relinquishment of parental rights must be signed after the birth of the child by the parent, whether or not a minor, whose parental rights are to be relinquished, witnessed by two credible persons, and verified before any person authorized to take oaths.

. . .

(c) The affidavit may contain:

(1) a designation of any qualified person, the State Department of Public Welfare, or any

authorized agency as managing conservator of the child;

(2) a waiver of process in a suit to terminate the parent-child relationship brought under Section 15.02(1)(K) of this code, or in a suit to terminate joined with a petition for adoption under Section 16.03(b) of this code; and

(3) a consent to the placement of the child for adoption by the State Department of Public Welfare to place children for adoption.

(d) An affidavit of relinquishment of parental rights which designates as the managing conservator of the child the State Department of Public Welfare or an agency authorized by the State Department of Public Welfare to place children for adoption is irrevocable. Any other affidavit of relinquishment is revocable unless it expressly provides that it is irrevocable for a stated period of time not to exceed 60 days after the date of its execution.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Petition for Writ of Certiorari to the Supreme Court of Texas has been sent to the attorneys for Respondents, Warren Cole, 1121 Walker, Suite 1100, Houston, Texas 77002 and George Moorman, P.O. Box 1808, Brenham, Texas 77833 by certified mail, return receipt requested on the 11th day of December, 1980.

JOHN V. ELICK